

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 7, 2004 Session

R.D.T., ET AL. v. F.A.J.
IN RE: E.D.J.

Appeal from the Chancery Court for Greene County
No. 2001-0291 Thomas R. Frierson II, Chancellor

No. E2003-01835-COA-R3-PT Filed August 12, 1004

F.A.J. ("Mother"), the biological mother of E.D.J., consented to give up her newborn baby for adoption to R.D.T. and S.A.T. ("Plaintiffs"). Within the ten day revocation period allowed by statute, Mother changed her mind and executed a revocation. Plaintiffs filed a verified complaint showing cause why E.D.J. likely would suffer immediate harm to her health and safety if returned to Mother. After a probable cause hearing, the Trial Court held E.D.J. likely would suffer immediate harm to her health and safety if returned to Mother and directed that E.D.J. remain with Plaintiffs. An agreed order for a plan of care was entered. Plaintiffs later filed a petition to terminate Mother's parental rights to E.D.J. After trial, the Trial Court held multiple grounds for termination were proven by clear and convincing evidence and that it was in the best interest of E.D.J. to terminate Mother's parental rights. Mother appeals the termination of her parental rights. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed;
Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Edward Kershaw, Greeneville, Tennessee, for the Appellant, F.A.J.

Jonathan R. Perry and Laura D. Perry, Franklin, Tennessee, for the Appellees, R.D.T. and S.A.T.

OPINION

Background

Plaintiffs desired to adopt a baby. R.D.T. is a physician. His wife, S.A.T. has a degree in nursing, but chooses to be a stay-at-home mother. The couple has a seven and a half year old son whom they adopted at birth in California. Plaintiffs now reside in Tennessee. In August of 2001, Plaintiffs learned E.D.J. had just been born and was being given up for adoption. Plaintiffs met E.D.J. in the hospital within hours of her birth and took E.D.J. home with them when she was released from the hospital.

On August 28, 2001, the Trial Court entered an order appointing Plaintiffs as guardians of E.D.J. Mother, E.D.J.'s biological mother, then executed a surrender as to E.D.J. on August 31, 2001, pursuant to Tenn. Code Ann. § 36-1-111.¹ On September 10, 2001, within the ten day revocation period allowed by Tenn. Code Ann. § 36-1-111, Mother executed a revocation of the surrender as to E.D.J. Plaintiffs then filed a verified complaint showing cause why E.D.J. likely would suffer immediate harm to her health and safety if returned to Mother.

The Trial Court conducted a preliminary hearing and by order entered November 21, 2001, held probable cause existed to believe that E.D.J. would be subject to immediate harm to her health or safety if she were returned to Mother. The Trial Court directed that E.D.J. remain with Plaintiffs. On May 16, 2002, the Trial Court entered an Agreed Order for Plan of Care ("Plan of Care") regarding E.D.J. Plaintiffs filed a petition pursuant to Tenn. Code Ann. § 36-1-113, on November 15, 2002, seeking to terminate Mother's parental rights as to E.D.J. Trial was held in April of 2003. At the time of trial, E.D.J. was twenty months old and had lived with Plaintiffs since her birth.

Mother resides with her son, Anthony Jobe, who was twelve years old at the time of trial, and her mother, Wanna Jobe. Anthony, who is deaf, attends the Tennessee School for the Deaf in Knoxville as a boarding student during the week. Anthony returns to the Jobe residence on weekends, holidays, and during the summer.

The Plan of Care required Mother and Wanna Jobe to complete or comply with eleven specific tasks. Among these tasks were that both Mother and Wanna Jobe complete a psychological evaluation, file a copy of the evaluation with the Trial Court, and follow each and every recommendation of that evaluation. In addition, both Mother and Wanna Jobe were required to attend and complete anger management classes and file a certificate of completion with the Trial Court. In addition, Mother was required to attend court-approved parenting classes and file a certificate of completion with the Trial Court; maintain a safe and clean home; demonstrate to E.D.J.'s guardian ad litem the physical ability to care adequately for an infant child; maintain lawful

¹ E.D.J.'s purported biological father filed a Waiver of Interest on September 19, 2001, waiving any and all parental rights as to E.D.J. and consenting to her adoption "by any persons chosen by the child's mother or any public or private agency."

employment; demonstrate an ability to meet E.D.J.'s financial needs by presenting to the guardian ad litem a budget of income and expenses; file copies of her income tax returns for the past three years with the Trial Court; maintain reliable transportation; and provide everything necessary for E.D.J.'s needs during visitations including such things as diapers, food, age appropriate books and toys. Supervised visitations were arranged to occur at Parent Place in Knoxville. The Plan of Care required Mother to be responsible for contacting Parent Place to arrange the visitations and for Mother to bring her son, Anthony, to each visit with E.D.J.

Visits between Mother and E.D.J. originally were set to last for 4.3 hours once a month. However, E.D.J., who had had no contact with Mother since her birth, had difficulties adjusting and, in the beginning, visitations frequently were terminated early because E.D.J. was crying inconsolably. Mother brought Anthony to some of the visits, but not all as required by the Plan of Care.

At trial, Joyce Rysewik, the program director of Parent Place testified regarding the visitations that occurred between Mother and E.D.J. Ms. Rysewik testified the visits began in May of 2002, but Mother did not bring Anthony to the visits until December of 2002. Ms. Rysewik testified she and her staff members have concerns about allowing unsupervised visitation between Mother and E.D.J. She stated "there's several times that [E.D.J.] has been left in positions that was a concern of us, her falling off the sofa, her safety." Ms. Rysewik also voiced concerns about Mother's parenting skills stating:

When her son is there, that her son takes care of the child a lot, and a part that does concern us is the frustration level that were also seen with Anthony and with mom and then some of the things that Anthony is allowed to do to take, help take care of this child. He appears to be taking a parenting role there.

Ms. Rysewik also stated she has concerns about "[Mother] changing [E.D.J.'s] diaper, of meeting her needs, of her safety" Ms. Rysewik also stated there was an occasion when E.D.J. was playing outside and the Parent Place staff member noticed E.D.J.'s arms and legs were chilly and told Mother. Mother's response was that E.D.J. was okay, which gave the staff member some concern. Ms. Rysewik also testified to concerns regarding Mother's observed lack of patience and anger level. She stated Mother does not supervise Anthony when she watches E.D.J. Ms. Rysewik stated Parent Place staff members would have to remind Mother where Anthony was and get him out of things he was getting into. Further, Ms. Rysewik testified about an argument she witnessed between Mother and Anthony over turning on a ceiling fan at Parent Place. Ms. Rysewik testified that after yelling at Anthony, Mother raised her hand to hit Anthony. Ms. Rysewik stopped Mother before she could hit Anthony by telling Mother that behavior wasn't allowed at Parent Place. Ms. Rysewik also testified that Anthony has hit or kicked Mother several times while at Parent Place.

Wendy Campbell, a case observer at Parent Place who observed several of the visitations between Mother and E.D.J., also testified at trial. Ms. Campbell testified regarding an

incident that occurred when Mother brought a camera to a visitation. Parent Place has rules regarding the taking of pictures at Parent Place. The rules require that prior permission of the Parent Place director be obtained and that the staff member present for the visitation take the picture to insure that only the child being photographed appears in the photo. The rules are in place to make the children comfortable so they don't feel like they are on display all the time and to preserve the confidentiality of others at Parent Place.

Mother arrived for one visit with a camera without obtaining prior permission. Ms. Campbell told Mother she could not take pictures without prior approval from the program director, but Mother proceeded to take pictures anyway. Ms. Campbell then took the camera away from Mother. Ms. Campbell testified Mother got upset and could not refocus on E.D.J. Ms. Campbell testified she gave Mother a choice to either refocus on E.D.J. and continue the visit or to leave. Mother chose to leave. Plaintiffs were called to pick up E.D.J. early. Ms. Campbell testified that after choosing to leave, Mother and Wanna Jobe came back to the door of Parent Place and demanded to be let back in. Ms. Campbell told them Mother could not resume the visit and closed and locked the door. Ms. Campbell testified Mother and Wanna Jobe became verbally aggressive and continued to ring the doorbell repeatedly. Ms. Campbell stated that because she was afraid a confrontation might occur as Plaintiffs were on their way to pick up E.D.J., she called the police. Mother was allowed to bring a camera and have pictures taken on another occasion when she had received prior approval from the director.

The Parent Place records show that Mother failed on multiple occasions to bring any food or drink for E.D.J. and on several occasions brought age-inappropriate formula and baby food. The records further show that on at least one occasion E.D.J. attempted to feed herself by taking hold of the spoon, but Mother took the spoon away from E.D.J. and refused to let E.D.J. feed herself. Mother told E.D.J. she didn't need to feed herself because she just wanted to make a mess. Further, the records show that during several visits, Mother failed to check E.D.J.'s diaper on a regular basis to determine if it needed changing. On one occasion, Mother changed E.D.J.'s diaper on the couch in full view of other visitors at Parent Place despite being reminded by a staff member of the changing table set up in another room. The records also show that on another occasion, Mother changed E.D.J.'s diaper without wiping her. Parent Place records also show that on multiple visits, Mother watched TV or video tapes with E.D.J., sometimes for long periods of time, and that there was no interaction between the two during those times. Further, the records show Mother talks to E.D.J. in baby talk during the visits.

Thomas P. Hanaway, Ph.D., a clinical psychologist prepared a report including a bonding assessment regarding E.D.J. Among other things, Dr. Hanaway observed two of the Parent Place visitations, made visits to the parties' homes, and talked to the parties and to family members and neighbors. Dr. Hanaway's report states:

[E.D.J.] appears to be very securely attached to [Plaintiffs] and her future with them and with peers looks promising. I believe that it would be highly disruptive to her development to take her out of the home she is in and place her in a home such as

where [Mother], Anthony and Wanna live. The emotional chaos, the likelihood of verbal and emotional abuse and the unwillingness to address problems in a realistic manner, I believe would be very detrimental to her.

* * *

The visits at Parent Place between [E.D.J.] and [Mother] demonstrate that [E.D.J.] clearly has not formed a significant attachment to [Mother]. She is now tolerating the visits better but she is very stressed at the beginning of the visit and she is ecstatic when rejoining [Plaintiffs] at the end of the visit. [E.D.J.] gives [Mother] very little eye contact, isn't readily comforted by her and she often appears to be preoccupied during the visits. Especially during the first hour of the visit she sits with her right index finger in her mouth and has her left arm over her face. [E.D.J.] appears to be more responsive to Anthony, giving him more eye contact and smiling at him more than at [Mother]. The lack of attachment she displays with [Mother] would likely bode ill for her future development if she were removed from [Plaintiffs] and sent to live with [Mother], Anthony and Wanna.

* * *

[Mother] has made very little progress in developing a relationship with [E.D.J.] during the visits at Parent Place. [E.D.J.] is beginning to tolerate the visits somewhat better but it would be a serious exaggeration to say that they have developed an attachment to each other. [E.D.J.] is very stressed when she has to leave [Plaintiffs] at Parent Place at the beginning of the visit with [Mother] and she is ecstatic when she gets to see [Plaintiffs] and return to their arms at the end of the visit.

I recommend that [E.D.J.] not be returned to live with [Mother], Anthony and Wanna Jobe. I believe that their home would be very unsuitable and potentially very damaging to her.

* * *

[E.D.J.] appears to be very securely attached to [Plaintiffs]. I believe that she has a promising future if she is allowed to live with them. On the other hand if she is removed from their care and returned to the Jobes, I believe that in addition to possibly being subjected to a chaotic and abusive home that the disruption in her attachment will cause her significant problems in her future development.

Testimony also was received from persons who work at the Tennessee School for the Deaf ("the School"). Anthony attends the School as a boarding student. Herbert Byrd, the Director of the Comprehensive Educational Resource Center at the School testified that the School has called the Department of Children's Services in the past regarding bruises and scratches on Anthony.

Testimony also was given by Tressa Murrell, who works at the School and has supervised Anthony both during bus rides to and from the School and at the cottage where Anthony lives during the week. Ms. Murrell testified she has some concerns regarding Anthony's home life. She stated sometimes Anthony would come back to school dirty after a week off. He would reply "no" when she asked if he had showered at home. Anthony came back to school after one three week Christmas break and told the staff he had showered only three times in that three weeks. Ms. Murrell also stated that Anthony often would come back to the School after a break without a haircut and staff members in his cottage at the School would cut his hair for him. Further, Ms. Murrell stated the School asked parents to send \$25 per month to cover supplies such as shampoo and often Mother failed to send this money.

Ms. Murrell also testified she has concerns about "marks [Anthony] had on his body when he came back, bruises, bite marks." Sometimes Anthony would tell her his cat or his dog did it. Sometimes Anthony would tell her his grandma or his mom had inflicted his injuries. Ms. Murrell testified that on one occasion, Anthony came back to school with a bruise on his shoulder approximately 8 centimeters long. At the time, Anthony, who was seven years old, told several stories regarding the origin of that bruise including "dog", "mama, pillow, bed", and that he fell off his bicycle. The School called Mother and she told them "that Anthony was out of control and his grandmother had hit him on the shoulder." Later, persons from the School visited the Jobe home to talk with Mother about a new behavior system and about the bruise. During that visit, Mother told them Anthony's grandmother had inflicted the injury, but Wanna Jobe told them it could have been a six year old friend of Anthony's.

Ms. Murrell testified that on one occasion, a staff member at the School noticed a bruise on the right side of Anthony's pelvis. Anthony reported his mom had hit him. Ms. Murrell testified that on another occasion, Anthony had an injury near his temple, and he said his grandmother hit him. Ms. Murrell testified that on one occasion in November of 1999, when the bus from the School arrived to pick up Anthony, he was found alone and crying. Anthony reported that his mother and grandmother had been arguing and his grandmother had hit him on the back. Ms. Murrell testified that another witness to the incident said Anthony's grandmother had driven the car away while Anthony was standing next to the open car door and the car door had hit Anthony in the leg as she drove off.

Ms. Murrell also testified regarding numerous instances when Anthony would return to the School after a break with bite or scratch marks inflicted by the family pit bull. Ms. Murrell testified that one time Anthony told her his grandmother told the family dog to bite him and the dog did. In January of 2002, Anthony reported he had a dog bite and the staff at the School infirmary noted a scratch made by the dog five centimeters long on Anthony's hip. In February of 2002, Anthony came back from winter break with injuries from the dog and the School contacted the Department of Children's Services.

The School records regarding Anthony were introduced at trial. In addition to the above described incidents and other documented injuries, the School records show that on several

occasions, Mother has refused or failed to give Anthony medicine prescribed by a doctor for various conditions including strep throat. In addition, the School records document several instances where Anthony has been involved in inappropriate sexual behavior.

Brenda Adams, a former neighbor of the Jobes, testified. Ms. Adams and her family lived in front of the Jobe residence from 1997 until 1999 or 2000. Anthony is close in age to Ms. Adams' sons and the boys would play together. Ms. Adams testified she witnessed an incident when Wanna Jobe pulled a large piece of wood off a shed and hit Anthony across the behind or back. Ms. Adams also witnessed Anthony beating on the door of the Jobe home and screaming to get in on several occasions. Ms. Adams testified that most of the time when Anthony would beat on the door, the door would not be opened to let him in, and, because of this she would give Anthony something to eat or drink. Ms. Adams also witnessed "[a] lot of yelling, screaming, cussing going on towards [Anthony]." Ms. Adams testified that Wanna Jobe was usually the one yelling at Anthony, and several times Ms. Adams noticed Mother standing nearby while this happened. Ms. Adams testified she witnessed Wanna Jobe chase Anthony down the street one day. When asked about the frequency of the incidents she was testifying about, Ms. Adams testified the incidents happened almost every day during the summer and on weekends during the school year. Ms. Adams testified she saw marks on Anthony's back that she described as stripes or welts from being hit. Ms. Adams also testified that one day Wanna Jobe sicced the Jobe's dog on Ms. Adams' children telling the dog to "kill, kill". Ms. Adams' husband protected the children on that occasion. Ms. Adams testified that on another occasion, the Jobe's dog bit her son on the belly.

Ms. Adams' husband, Roy Adams, purportedly is the father of E.D.J. Although Mother informed Ms. Adams that Roy Adams was the father of E.D.J., Ms. Adams refuses to believe her husband had an affair with Mother and stated she thinks Mother is crazy for making such an accusation. However, Roy Adams does not dispute that he may be the father of E.D.J. Roy Adams testified he believes Mother has mental problems and bases this belief on "[t]he way she treated her child."

Cindy Carter, who currently lives across the street from the Jobe residence, testified at trial. Anthony has been playing with Ms. Carter's daughters for about three months. Ms. Carter testified that Anthony comes over to her house when her girls get home from school on Fridays around 3:00 p.m. and stays until she calls her girls in to get ready for bed. Ms. Carter stated sometimes Anthony will stay even after dark playing in the Carter's carport. Ms. Carter stated she puts her girls to bed at 9:00 p.m. and sometimes Anthony still will be playing in her carport at that time. Ms. Carter also testified she has seen Anthony beating on the door of the Jobe house and yelling to be let in. Sometimes they open the door to let him in and sometimes they don't. Ms. Carter testified that when they don't open the door, Anthony will go back to playing. Ms. Carter testified that the Jobe's dog broke through a window in the Jobe home in an attempt to attack someone approximately ten days before trial. The window had not been fixed as of the time of trial but was covered with cardboard. Ms. Carter stated she has seen Anthony wearing the same outfit up to six days in a row and that at these times his hair appeared greasy. Ms. Carter hears a lot of yelling from the Jobe house on the weekends and has heard Mother cuss at Anthony.

Seven year old Austin Hunter, another neighbor and friend of Anthony's, also testified regarding the Jobe's dog. The dog attacked and bit Austin on his bottom a couple of days before trial. Photographs of Austin's injury, taken a day or two after the incident, were introduced at trial. Austin testified that Mother was there when he was attacked, and she put some peroxide on the dog bite before Austin went home.

Two of the individuals who testified at trial were relatives of Mother and Wanna Jobe. Rebecca Garay-Leon, Mother's sister, testified she will not allow her children to stay with her mother, Wanna Jobe, because of the arguing and fighting in the Jobe household. Ms. Garay-Leon testified she talks to Wanna Jobe on the phone twice a week and can hear fighting and arguing and hears Wanna Jobe being verbally abusive to Mother. Patricia Franklin, who is related to Mother and Wanna Jobe by marriage, testified that as recently as four or five months prior to trial Mother asked her for money for groceries. Ms. Franklin testified that although Mother didn't have money for groceries, Mother continued to smoke.

Mother testified nothing has changed regarding her living arrangements since November 2001, when the Trial Court conducted the probable cause hearing and held probable cause existed to believe E.D.J. would be subject to immediate harm to her health or safety if she were returned to Mother. Mother testified she is still living at the same address with Wanna Jobe and her son Anthony on the weekends and during holidays and summers. Wanna Jobe owns the house they live in. Mother testified the house they live in has three bedrooms. She sleeps in one, Wanna Jobe sleeps in one, and Anthony sleeps in one. When asked where E.D.J. would sleep, Mother stated she would get rid of her dresser and put E.D.J.'s bed in her room.

Mother testified she still is not employed. She testified she is able physically and mentally to work but chooses not to do so because it would reduce the amount of benefits she receives on Anthony. Mother then stated "But I can change that." However, despite being given time since the Plan of Care was entered, Mother made no effort to make this change. Mother receives \$552 a month for Anthony's disability, but this amount will go directly to Anthony when he turns eighteen. Mother testified she and Anthony probably couldn't live on the \$552. The income for the household is earned by sixty-eight year old Wanna Jobe who smokes a pack and a half of cigarettes a day. Mother testified she has not filed income tax returns for the past three years.

Mother testified she believes she has met the requirements of the Plan of Care because she assists Wanna Jobe in her job, which involves putting together shutters at home. A shutter is a piece about the size of a thumbnail designed to hold a car key in the ignition. It is made of four tiny pieces that are put together using a machine. Mother stated that when Wanna Jobe gets paid, Mother gets half of that money. However, the money made from Wanna Jobe's job goes into Wanna Jobe's checking account. Mother testified she does not have a checking account. Mother has only a savings account into which Anthony's disability check gets deposited. Neither Mother nor Wanna Jobe receive any other benefits from Wanna Jobe's job such as insurance or healthcare. Mother also stated she would need to cut down on the number of shutters she assembles in order to

supervise E.D.J., which would cut down on the monthly household income by an estimated \$150.

Mother filed a budget including Wanna Jobe's income. The budget shows that after expenses, approximately \$425 is left each month. However, Mother admitted the budget does not include all their expenses. The budget does not include expenses for the car including gas and repairs, but Mother stated she and Wanna Jobe divide up these expenses and estimated that it cost approximately \$30 a week for gas and approximately \$300 every six months for maintenance and repairs. The budget also does not include the \$25 monthly charge for pest control service or an allowance for clothing. Mother estimated she spends approximately \$100 every two months for her clothing and this estimate does not include expenditures for clothing for Wanna Jobe, Anthony, or E.D.J. The budget also does not include money for diapers or food for E.D.J. Mother estimated it would cost approximately \$15 to \$20 per week for diapers and a couple hundred dollars a month for food.

Despite completing the court-approved parenting classes, Mother testified she has changed nothing regarding the way she parents Anthony since the probable cause hearing. Mother admitted Wanna Jobe punishes Anthony, but stated Wanna Jobe didn't start punishing Anthony until he was about four years old. Mother also testified she has hit Anthony in the face for using a bad word. In addition, Mother was informed by the School that a neurologist believes Anthony has Tourette's syndrome. Ms. Murrell from the School testified she noticed that Anthony began to have strange movements or "tics, like a lot of jerking back, and he had excessive screaming the whole time that I had him, just uncontrollable screaming at times." Mother told the School she would have Anthony evaluated, but she never has done so.

Mother testified she still has the dog² and states there is no problem with the dog. However, Mother also stated she thinks she should get rid of it because it "bit two children. He bit my child once and another child in the neighborhood." Mother testified she would not have told in court about the dog biting Austin unless she had been asked about it at trial. She stated she just forgot the dog attacked Austin a couple of days ago.

Mother does not have a driver's license and since the probable cause hearing in 2001, has made no attempt to get a driver's license. Mother relies upon Wanna Jobe for transportation. Wanna Jobe has a 1977 Dodge Aspen, but she has no automobile insurance. Mother stated that if Wanna Jobe can't take her somewhere, she will walk and Anthony can walk and Mother will carry the 20 month old E.D.J.

Mother testified that since August of 2001, she has sent no birthday cards to E.D.J., written no notes to her, drawn no pictures for her, given her no Christmas gifts, paid no child

²Mother's appellate brief states that since trial, the dog has been euthanized. However, this post-judgment fact is not properly in the record before us. Further, even if the dog no longer lives in Mother's house, Mother has demonstrated a continuing lack of concern regarding the danger posed to Anthony and others by this vicious animal and has refused to take steps to protect her child from the danger. Even at trial when Mother acknowledged she should get rid of the dog, she still refused to admit that the dog was a problem.

support, and saved no money for her future needs. When asked what ambitions or goals Mother has for her children she replied “I hope when [E.D.J.] grows up, that she will be a dancer. . . . Ballet dancer.”

Jeffrey A. Armstrong, guardian ad litem for E.D.J. testified he doesn’t “think there’s been material, . . . substantial non-compliance” with the plan of care. He stated:

[Mother’s] complied with the majority of everything on there. She’s gone through, you know, the steps and, you know, while that would have been - - for example, on the issue of whether she was to obtain I guess lawful employment, I mean it would have I suppose have been nice if, you know, she had gone out and got a, you know, 40-hour a week job and, you know, found something that’s a little bit more substantial than what she’s doing, but she complied. . . .

Mr. Armstrong testified he believed “[Mother’s] essentially complied with the Plan of Care.” However, Mr. Armstrong admitted Mother is not lawfully employed. Neither does she claim any income upon which she pays any taxes. Mr. Armstrong also testified Mother’s budget does not demonstrate she has the financial means to meet the needs of an infant child. Mr. Armstrong also testified Mother hasn’t demonstrated she can adequately care for an infant child.

The Trial Court entered a final judgment on June 24, 2003, holding, *inter alia*, that multiple grounds for the termination of Mother’s parental rights were proven by clear and convincing evidence and that such termination was in the best interest of E.D.J. In its memorandum opinion incorporated into the final judgment, the Trial Court made specific factual findings and held, *inter alia*, that Mother willfully failed to support and willfully failed to make reasonable payments toward E.D.J.’s support in the four months preceding the filing of the petition; that Mother did not substantially comply with the responsibilities identified in the Plan of Care; that the conditions that prevented E.D.J.’s safe return to Mother’s care still persist and there is little likelihood that these conditions will be remedied; and that Mother had committed and allowed severe child abuse to Anthony, a sibling of E.D.J. The Trial Court held it was not proven by clear and convincing evidence that Mother manifests a mental condition which presently so impairs her, and which will likely continue to so impair her, such that it is unlikely that Mother will be able to assume the care and responsibility of E.D.J. in the near future.

The Trial Court found Mother had failed to adjust her conduct or the relevant conditions sufficient to make it safe for E.D.J. to be in her home; that despite visitations, Mother had made little progress in developing a meaningful relationship with E.D.J.; and that a change of caretakers and physical environment likely would have an adverse effect upon E.D.J.’s emotional, psychological, and mental condition, and held it was in E.D.J.’s best interest for Mother’s parental rights to be terminated.

Mother appeals the termination of her parental rights.

Discussion

Although not stated exactly as such, Mother raises two issues on appeal: 1) whether Mother substantially complied with the Plan of Care; and 2) whether there were other grounds to terminate Mother's parental rights to E.D.J.

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). As discussed by this Court in *In re Adoption of T.A.M.*, No. M2003-02247-COA-R3-PT, 2004 Tenn. App. LEXIS 317 (Tenn. Ct. App. May 12, 2004), *no appl. perm. appeal filed*:

Because of the heightened burden of proof required by Tenn. Code Ann. § 36-1-113(c), we must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact *de novo* in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *Jones v. Garrett*, 92 S.W.3d at 838; *In re Valentine*, 79 S.W.3d at 546; *Ray v. Ray*, 83 S.W.3d at 733; *In re L.S.W.*, 2001 Tenn. App. LEXIS 659, No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at *5 (Tenn. Ct. App. Sept. 6, 2001), *perm. app. denied* (Tenn. Dec. 27, 2001).

In re Adoption of T.A.M., 2004 Tenn. App. LEXIS 317, at ** 8-9 (footnote omitted).

In *Dep't of Children's Servs. v. D.G.S.L.*, this Court discussed the relevant burden of proof in cases involving termination of parental rights. Specifically, we observed:

It is well established that "parents have a fundamental right to the care, custody, and control of their children." *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). "However, this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

Termination of parental or guardianship rights must be based upon a finding by the court that: (1) the grounds for termination of parental or guardianship rights have been established by clear and convincing evidence; and (2) termination of the parent's or guardian's rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c). Before a parent's rights can be terminated, it must be shown that the parent is unfit or substantial harm to the child will result if parental rights are not terminated. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Similarly, before the court may inquire as to whether termination of parental rights is in the best interests of the child, the court must first determine that the grounds for termination have been established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c). This Court discussed the "clear and convincing evidence" standard in *O'Daniel v. Messier*, 905 S.W.2d 182 (Tenn. Ct. App. 1995), as follows:

The "clear and convincing evidence" standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). While it is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, 455 U.S. at 766, 102 S. Ct. at 1401; *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App. 1987).

Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. *See Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992). It should produce in the fact-finder's mind a firm belief or conviction with regard to the truth of the allegations sought to be established. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993); *Brandon v. Wright*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985). . . .

Dep't of Children's Servs. v. D.G.S.L., No. E2001-00742-COA-R3-JV, 2001 Tenn. App. LEXIS 941, at **16-18 (Tenn. Ct. App. Dec. 28, 2001), *no appl. perm. appeal filed*.

Termination of parental rights may be based upon any of a number of statutory grounds. As relevant to this appeal, the statutory provisions provide parental rights can be terminated for the following reasons:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

(4) The parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of such parent or guardian;

* * *

(8)(A) The chancery and circuit courts shall have jurisdiction in an adoption proceeding, and the chancery, circuit, and juvenile courts shall have jurisdiction in a separate, independent proceeding conducted prior to an adoption proceeding to determine if the parent or guardian is mentally incompetent to provide for the further care and supervision of the child, and to terminate that parent's or guardian's rights to the child.

(B) The court may terminate the parental or guardianship rights of that person if it determines on the basis of clear and convincing evidence that:

(i) The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future, and

(ii) That termination of parental or guardian rights is in the best interest of the child.

(C) In the circumstances described under subdivisions (A) and (B), no willfulness in the failure of the parent or guardian to establish the parent's or guardian's ability to care for the child need be shown to establish that the parental or guardianship rights should be terminated. . . .

Tenn. Code Ann. §§ 36-1-113(g) (Supp. 2003). Tenn. Code Ann. § 36-1-102(1)(A)(i) defines "abandonment" as follows:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

Tenn. Code Ann. § 36-1-102(1)(A)(i) (Supp. 2003).

In the present case, the Trial Court found there was clear and convincing evidence that the statutory grounds for termination in Tenn. Code Ann. §§ 36-1-113(g)(1) through (g)(4) had

been met. Clear and convincing evidence supporting any single ground will support a termination order. *See In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

We first consider whether Mother substantially complied with the Plan of Care. We note that substantial noncompliance with a plan of care constitutes sufficient grounds to terminate parental rights under Tenn. Code Ann. § 36-1-113(g)(2). The evidence shows Mother has failed to maintain a safe home as required in the Plan of Care. Mother refuses to admit that the family dog is dangerous despite the fact that this dog has inflicted numerous injuries upon Anthony and has attacked others including a seven year old neighbor mere days before trial. Mr. Armstrong, the guardian ad litem, testified Mother's budget does not demonstrate she has the financial means to meet the needs of an infant child. Mr. Armstrong also testified Mother hasn't demonstrated she can adequately care for an infant child. Joyce Rysewik, the program director of Parent Place, also testified she has concerns regarding Mother's ability to parent an infant child. Ms. Rysewik testified, among other things, to concerns regarding Mother's ability to keep E.D.J. safe, to appropriately change E.D.J.'s diaper, and to supervise both E.D.J. and Anthony. In addition, Mother has failed to maintain employment and file her income tax returns with the Trial Court as required by the Plan of Care. Mother also failed to provide everything necessary for E.D.J.'s needs during visitations and failed to bring Anthony to each visit as required by the Plan of Care. We hold the Trial Court properly found clear and convincing evidence exists to terminate Mother's parental rights to E.D.J. based upon substantial noncompliance with the statement of responsibilities in the Plan of Care.

We next address whether there were other grounds to terminate Mother's parental rights to E.D.J. The petition to terminate Mother's parental rights was filed on November 15, 2002. Thus, the relevant statutory time period for ascertaining whether Mother abandoned her daughter under Tenn. Code Ann. § 36-1-102, is from July 15, 2002, through November 14, 2002. It is important to note that in making this analysis, "only a parent's conduct in the four months immediately preceding the filing of a petition then before the court may be used as grounds to terminate parental rights" under this statutory section. *See In re D.L.B.*, 118 S.W.3d 360, 366 (Tenn. 2003).

Our Tennessee Supreme Court has held that an "element of intent must also be applied to the definition of abandonment" *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003)(citing *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999)). Although the Trial Court found Mother had willfully failed to support or make reasonable payments toward E.D.J.'s support during the relevant time period, the record does not support a finding that the element of intent existed. We hold clear and convincing evidence does not exist in the record as discussed sufficient to support this ground for termination.

The Trial Court found clear and convincing evidence existed to support grounds for termination under Tenn. Code Ann. § 36-1-113(g)(3). The Trial Court held the conditions that prevented E.D.J.'s safe return to Mother's care still persist and there is little likelihood that these conditions will be remedied. Mother herself testified nothing has changed regarding her living arrangements since November 2001, when the Trial Court conducted the probable cause hearing and

held probable cause existed to believe E.D.J. would be subject to immediate harm to her health or safety if she were returned to Mother. The evidence shows Mother still lives with Wanna Jobe who has been verbally and physically abusive to Anthony. Mother herself admitted she has hit Anthony in the face. Anthony still is allowed to be out at night unsupervised and is often locked out of the Jobe home and denied entrance even when he beats on the door. In addition, at the time of trial, Mother still had the vicious dog who has repeatedly injured Anthony and has attacked and bitten others including seven year old Austin Hunter just mere days before trial. This dog broke a window in the Jobe residence approximately ten days before trial in an attempt to attack someone. Despite all this, Mother persists in her refusal to believe the dog is a problem. Mother still is not employed and cannot demonstrate the ability to provide financially for E.D.J.'s basic needs such as food, healthcare, and diapers. Mother still does not have a driver's license or any means of transportation other than relying upon Wanna Jobe to drive her in Wanna Jobe's uninsured car. Mother testified that despite attending the court-approved parenting classes, she has changed nothing about the way she parents Anthony since the probable cause hearing. Further, Mother has failed to save any money to provide for E.D.J.'s future. We find no error in the Trial Court's decision that clear and convincing evidence was presented sufficient to support this ground for the termination of Mother's parental rights.

The Trial Court found Mother has committed and allowed severe child abuse to Anthony, a sibling of E.D.J., which would provide grounds for termination under Tenn. Code Ann. § 36-1-113(g) (4). Severe child abuse is defined in Tenn. Code Ann. § 37-1-102, which provides, in pertinent part: "The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause great bodily harm or death and the knowing use of force on a child that is likely to cause great bodily harm or death; . . ." Tenn. Code Ann. 37-1-102(21)(A) (Supp. 2003). Mother has knowingly exposed and knowingly failed to protect Anthony from severe verbal, emotional, and physical abuse at the hands of both herself and Wanna Jobe. Mother has also failed to protect Anthony from the vicious family dog as evidenced by the numerous reports in the School records of bites and scratches inflicted by the dog. In addition, Mother has neglected Anthony by knowingly failing to provide Anthony with necessary medical care both by failing or refusing to have him evaluated as requested by the School and by failing or refusing to give him necessary prescription medications on several occasions for various conditions including strep throat. We hold clear and convincing evidence exists in the record sufficient to support these grounds for the termination of Mother's parental rights as to E.D.J.

The Trial Court held there was no clear and convincing evidence sufficient to satisfy the grounds for termination under Tenn. Code Ann. § 36-1-113(g)(8). The evidence does not preponderate against the findings relevant to this determination by the Trial Court. We affirm the Trial Court's holding that there was no clear and convincing evidence presented sufficient to satisfy the grounds for termination under Tenn. Code Ann. § 36-1-113(g)(8).

The Trial Court held it was in the best interest of E.D.J. for Mother's parental rights to be terminated. In pertinent part, Tenn. Code Ann. § 36-1-113(i) provides:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social service agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (Supp. 2003).

The evidence shows Mother has failed to adjust either her conduct or the conditions in her home to make it safe and in E.D.J.'s best interest to be in the home. Mother continues to commit and allow the abuse of Anthony. She refuses to recognize there is a problem with her vicious dog who continues to attack Anthony and others. In addition, E.D.J. has lived with Plaintiffs

her entire life. Dr. Hanaway's report on bonding shows E.D.J. has formed a secure attachment to Plaintiffs, but that Mother "has made very little progress in developing a relationship with [E.D.J.]" Dr. Hanaway recommended E.D.J. not be returned to live with Mother. His report stated a disruption in E.D.J.'s attachment to Plaintiffs "will cause her significant problems in her future development." We find no error in the Trial Court's judgment that clear and convincing evidence exists in this record showing it would be in the best interest of E.D.J. to terminate Mother's parental rights.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, F.A.J.

D. MICHAEL SWINEY, JUDGE